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VREELAND & THOMPSON, P.C.

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Your Workplace Is Our Work®

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EEO-1 Component 2 Filing – What You Need to Know

The website for the EEO-1 Component 2 online filing system is open, complete with long-awaited sample forms, fairly straightforward instructions, and answers to frequently asked questions. The EEOC contracted with National Opinion Research Center (NORC) at the University of Chicago to conduct the data collection and assembly. NORC is one of the largest independent social research organizations in the country. The site contains few surprises. It clarifies some concerns, confirms some things we were pretty sure we knew, and creates a couple of new questions.

What: Component 2 is the pay and hours worked data collection in addition to Component 1, which is the original EEO-1 that has been filed with few changes every year since 1966. This year, Component 2 also must be filed for snapshots of the years 2017 and 2018. The snapshots can be any pay period between October 1 and December 31, and do not have to be the same pay period in both years.

Who: For the most part, the same employers who are required to file the original EEO-1 (Component 1) are required to file Component 2. All employers with at least 100 employees must file both Component 1 and 2. Many federal contractors with less than 100 employees were required, as always, to file Component 1 earlier this year, but no federal contractor with less than 100 employees is required to file Component 2 for either year. Employers with fluctuating workforces can use a pay period with less than 100 employees on the payroll and avoid the Component 2 filing requirement. Just remember that all full and part time employees on the payroll during the snapshot period must be counted.

When and How: The report must be filed electronically for both 2017 and 2018 by September 30, 2019. If filing electronically would create undue hardship, an employer can request a special reporting procedure (see instruction 5). Those required to report should have received a letter and/or email notification with a user ID to access the reporting site. The main website for forms/information/filing is https://eeoccomp2.norc.org and the help desk can be emailed at EEOCcompdata@norc.org. There is nothing to install; everything is done through the website. After entering all the pay and hours worked data (and saving a copy for your records), do not exit the site before completing the Certification. The Certification page is easy to find if you just remember to look for it. No matter how hard you worked gathering the data and reporting exactly as instructed, without the completed Certification, the report is not filed.

Changes/Clarifications: The only change from the original 2016 Component 2 sample form is the pay data heading is now "Salary Compensation Band" instead of "Annual Salary", clarifying that the salary band amounts are based on W-2, Box 1 income and not annual salary.

Component 2 instructions allow using a proxy of 40 hours per week for full time exempt employees, 20 hours for part time, or actual hours worked. Since using proxy hours could result in inaccurate reporting, the 2016 instructions included this statement: "To the extent that the use of the proxy numbers cause some deviation from an exempt employee's actual hours worked, the certification of the report as accurate would be considered appropriate." Without explanation, this sentence was not in the recently published instructions.

The 2016 instructions stated, "The confidentiality requirements allow the EEOC to publish only aggregated data, and only in a manner that does not reveal any particular filer's or any individual employee's personal information." Again, without explanation, this sentence was omitted from the recently published instructions.

In accordance with a recent Supreme Court decision, the bases upon which EEOC may reject a Freedom of Information Act request for pay data was expanded. It previously relied solely upon FOIA Exemption 3 when a suit had not been filed on an investigated charge. Now Exemption 4, which protects trade secrets, commercial or financial information, may be applicable.

Last, but certainly not least important: An appeal of the federal court ruling from March 2019 that reinstated the Component 2 filing requirement is still pending. Of course, this means that everything about this portion of the EEO-1 could change in an instant. But it does not mean that it will. With the deadline to compile and report pay and hours worked data approaching, employers should assume they must file as instructed by September 30.

As more information becomes available, we will let you know.

Better Results, Lower Pay

After winning their fourth World Cup title, the U.S. Women's Soccer team cemented themselves as the undisputed dominant force in women's soccer. Yet they earn only third of what the men's soccer team makes – which is the basis of two pending lawsuits against the U.S. Soccer Federation over pay equity. The cases highlight the difficulty in quantifying employee worth and contribution. The women's team is undeniably more successful with two consecutive world championships, while the men exited the last World Cup in the Round of 16. But the men face a larger field of competition, with more teams arguably capable of winning championships. And yet the women play 19 more games (i.e., work more). All of these factors are important, but none make for easy comparisons.

As we told you last month, Alabama became the 49th state in the nation to pass an equal pay law (in additional to the federal Equal Pay Act) requiring that men and women be paid the same for the same or substantially similar work. To make a claim under the act, an employee does not have to prove an intent to discriminate, they just have to show a difference in pay for the same work that is not justified by a legitimate factor (such as skill, experience or education).

For longer term employees, many pay differences started with decisions made long ago by managers who are no longer with the organization. How can you protect your company from liability for equal pay claims? We recommend conducting an audit of your compensation system. Review how compensation decisions are made (the process) and confirm that the factors considered are relevant to the job and are not possible proxies for gender. Also make sure the factors are actually applied in consistent manner by all those involved. Then review the current compensation structure (the result) to make sure you can explain differences with legitimate factors.

FMLA Vacation - $2 Million Jury Award

Employers have the right to act when in good faith they believe that an employee is abusing Family and Medical Leave. The risk an employer faces is when an employer's lack of knowledge of the Family Medical Leave Act results in a mistaken belief that FML has been abused.

In the case of *DaPrato v. Massachusetts Water Resources Authority* (Mass. S.Ct. June 5, 2019), an employee took FML and went on vacation during the course of the leave. DaPrato provided medical substantiation of the need to be out of work for four to six weeks due to surgery on his foot. The certification indicated that DaPrato should be able to begin to apply weight to his injured foot at approximately 4 weeks after the surgery. Because the employer required that vacation time must be used concurrently with FML, DaPrato did not want to exhaust his vacation time. Thus, he had every incentive to try to return to work. DaPrato attempted to return to work after just a few weeks by using crutches to refrain from putting weight on his foot.

The employer would not let DaPrato return to work until he provided medical substantiation that he could perform his essential job functions, with or without an accommodation. This was certainly within the employer's rights. However, the problem was that DaPrato could not obtain a medical appointment for about a month, and he obtained FMLA extensions for that reason. Therefore, during that month-long period while out on FML, DaPrato took a planned two-week vacation to Mexico. DaPrato returned from vacation and asked the HR Director about salary continuation benefits for an upcoming FML-covered knee surgery. The HR director forwarded DaPrato's email to the HR manager, stating, "Is he serious?" to which the HR manager replied with "OMG."

That same day, the company first learned that DaPrato was on vacation during the last two weeks of FML, and, after an investigation where they obtained some video of him standing and walking when attempting to return to work, but where HR withheld the FMLA certification forms (which indicated that DaPrato would be able to gradually begin weight-bearing activities, but would be restricted in driving), executives terminated his employment because the company believed the vacation was an abuse of FML. DaPrato sued, claiming that his termination was in retaliation for using rights under the FMLA. At trial, the company produced photographs showing that DaPrato had no problem standing, as he was on a fishing boat, proudly displaying a large fish he had caught. However, the company did not become aware of these pictures until after it terminated DaPrato. At the time of termination, it knew only that DaPrato had gone on vacation. As far as the reason for terminating DaPrato, the HR director testified at trial that, "I wouldn't think somebody who is seriously ill or disabled would be able to be on vacation." This mistaken assumption contributed to an overall jury award in excess of $2 million.

There are some key lessons learned for employers to deal with FMLA (or other leave) abuse:

1. An individual on FML is not *per se* precluded from doing other things, such as taking a vacation. Rather, the issue of abuse is whether there is evidence that what the employee did on vacation was inconsistent with the reasons for the employee's absence. In this case, the Court stated that, "An employee recovering from a leg injury may sit with his or her leg brace on the seashore while fully complying with FMLA leave requirements but may not climb Machu Picchu without abusing the FMLA process."

2. We have said so often that e-mail may mean "electronic mail," but when it comes to HR-related matters, it is "evidence mail." The e-mail exchange between the HR director and manager was used as evidence to suggest to the jury a retaliatory motive (DaPrato's past and upcoming use of FMLA) as a reason for his termination.

3. Retaliation includes not only the current use of FMLA, but where an individual expresses the intent to use FMLA in the future. In this case, the retaliation was considered two-fold: one for DaPrato taking a vacation and two for DaPrato stating that he would need additional FML in the future.

4. We have also seen situations where an employee retains a second job while on FML and continues to work at that second job. That is not necessarily FML abuse. The issue for the second job is the same as vacation: if there is no uniformly-applied prohibition against moonlighting (or other similar policy), is the work consistent or not with the reason for the individual's absence.

Lance Parmer Joins LMVT

We are delighted to announce the association of Lance Parmer with our firm. Lance was named a "Rising Star" and a "Top Attorney" in Civil Litigation by Birmingham Magazine in 2019. Prior to joining LMVT, Lance worked for several years for a mid-size corporate firm in Birmingham, Alabama, focusing on employment defense, medical malpractice defense and general litigation. Lance, who is from LaGrange, Georgia, graduated *cum laude* from Auburn University and was a member of the *Law Review* at the Cumberland School of Law in Birmingham, Alabama. While at law school, Lance also served as a Deputy Justice on the Cumberland Honor Court and was the recipient of a merit scholarship. Lance's addition to the firm enables us to continue our commitment to provide our clients and relationship partners with the highest quality of prompt and creative legal and business support at a reasonable cost.

Madison Square Garden Ticket Prices May Increase - $1.3 Million Owed in Criminal Background Check Litigation

Madison Square Garden in Manhattan is the location of a dreadful NBA team the New York Knicks. As if things were not bad enough for MSG, it ended up settling a case for a total of $1.3 million, which is a combination of $519,800 to class members and $750,000 in attorney fees regarding the improper use of criminal background checks.

There are two elements to the class action worth noting. The first is a basic one that violated the Fair Credit Reporting Act, which involved MSG refusing to provide applicants with a copy of their background report, as required. The second is based upon the claim of "disparate impact." That is, MSG withdrew offers of employment from applicants who failed to disclose information about criminal convictions (a question MSG had the right to ask). The plaintiffs alleged that practice had a disproportionate adverse effect on African American and Latino applicants. The settlement includes MSG narrowing the scope of its criminal convictions inquiry to those that have occurred in the past five years. It will also not require that applicants disclose marijuana convictions or refuse to hire applicants if there is a current criminal charge against the applicant. Finally, MSG previously had a lifetime ban in considering applicants who fail to disclose their criminal history. As part of this settlement, MSG will shorten that time frame, so the applicant gets another bite at the [big] apple.

NLRB News

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 404.312.4755.

At the end of the month, the Division of Advice head, Jamye Sophir, will retire after serving two years as an Associate General Counsel for the Division. She will be replaced by Richard Bock, another career lawyer (as was Ms. Sophir), with the NLRB. The Division of Advice serves as the chief legal counsel for the NLRB, and its head serves as the General Counsel's lawyer before the Board, represents the Board before the courts, and regularly answers legal questions from the regional offices.

Trump Board Roll Back of Obama Administration's Decisions Continues Unabated

The conservative Labor Board currently in power continues to exhibit its penchant to assault Obama-era precedent. If President Trump is re-elected, expect this

trend to continue. Some of the key cases (besides the obvious ones also discussed below) that demonstrate this trend are discussed below.

Johnson Controls, Inc.

The NLRB has revamped its test for determining whether an employer can legally withdraw recognition from a union the employer believes has lost majority support. This scraps the legal doctrine articulated in *Levitz Furniture* in favor of a more business-friendly standard. In a 3-1 decision, the Board updated its legal framework for employers engaged in "anticipatory withdrawal" of recognition, which can occur before the union and an employer reach a collective bargaining agreement. Under the old rule, which the majority says has proven itself as unworkable and not adequate to protect employee freedom of choice, the Board majority stated:

> In what often can be a contentious and confusing time for employees who are being [constantly] asked to express their representational views, the 'last in time' rule strikes [the Board] as ill-suited for making such an important determination. . . Today, [the Board] establishes a new framework that is fairer, promotes greater labor relations stability, and better protects Section 7 rights by creating a new opportunity to determine employees' wishes concerning representation through the preferred means of a secret ballot, board conducted election.

Thus, *Levitz* was partially overruled. Now, the Board permits withdrawal of recognition if the employer receives evidence that the union has indeed lost majority support within 90 days of the expiration of the contract. The union then has 45 days of the employer's anticipatory withdrawal of recognition to petition the NLRB for a Board ordered election to determine employee support of the union as the continued bargaining representative.

This constitutes a major shift in precedent. The new rule is applied retroactively to all pending cases. The newer rule ends the "unsatisfactory process" of trying to figure out employees' true feelings about union representation through the unfair labor practice adjudication process.

Aggressive Rulemaking Continues

In its rulemaking, the Board has targeted graduate student/teaching assistant unions. The NLRB has announced that it is planning to unveil regulations that clarify whether graduate assistants/teaching aides are employees and therefore able to form a union.

Expect the Board to make changes as part of the Trump administration's push to aggressively use rule-making to change regulations. On the agenda, released recently by the OMB office of information and regulatory affairs, include among other topics: joint employer issues, withdrawal of recognition, blocking charges, the formation of section 9(a) relationships in the construction industry [section 8(f) of the act], and standards for access to an employer's private property.

John Ring stated that the 29,000 comments already received by the Board regarding its proposed rulemaking in the joint employer area, demonstrates wide-spread public interest in the matter. Commenting on the agenda itself, Ring stated that:

> The agenda demonstrates the Board majority's strong interest in continued rule-making. Addressing these important topics through rule-making allows the Board to consider and issue guidance in a clear and more comprehensive manner.

The joint employer issue was most recently discussed in the January Employment Law Bulletin. As predicted, the D.C. Circuit remand of *Browning-Ferris* to the Board seems superfluous. Unions are acting aggressively in response to the rule-making initiative. For example, a SEIU local union asked to withdraw a charge alleging that an employer disciplined certain workers without giving the union a chance to negotiate the discipline before the employer issued the discipline. The charge caught the eye of the GC as a possible vehicle for changing Board precedent. Rather than potentially lose the war, SEIU is attempting to lose just the battle.

The decision to ask the Board to drop charges comes after an Administrative Law Judge determined that the employer was guilty of committing an unfair labor

practice. According to the ALJ decision, the employer suspended three employees and discharged one employee without affording the SEIU the opportunity to bargain or offering to bargain concerning the discipline. The current law requires that an employer consult and bargain with a union that has won an election even though no contract has been reached. The employer has asked the Board to review the ALJ decision.

The NLRB continues to promise to go slow in revamping the expedited or "quickie election" rules, first discussed in the December ELB. These rules are on the long-term agenda for rule making treatment by the Board. Ultimately, expect changes to the expedited rules for elections during President Trump's second term if he is re-elected in 2020.

Union Blasts NLRB Effort to Silence the "Rat" Permanently

In an issue that has vexed the NLRB for ages (at least since 2010 while I was at the Board), the inflatable rat has gotten the attention of the NLRB. The union has attacked the NLRB as engaged in an "Orwellian effort" to muzzle the symbol used by unions protesting use of non-union labor at construction projects. During the Obama administration, the Regions could never get by the First Amendment protections of free speech and the ability of unions to handbill rather than picket in protests aimed at non-union labor. In response to the petition for a 10(j) temporary injunction to the district court judge, the union claimed that the Board:

> [If the injunction is granted to the Board], it would mean that a federal agency could ban highly expressive images – like the inflated rat or maybe so too the inflated cockroach – because the balloons may cause the public to think thoughts of Shoprite [the employer using nonunion labor] and the government do not want [the public] to, such as how unfairly the economy treats workers.

The petition alleges that the inflatable rat was put near the Shoprite store in Staten Island to force the owner of Shoprite, Kevin Mannix (an alleged neutral) to cease doing business with the primary employer - who actually hired nonunion labor and pays alleged substandard wages – GTL Construction LLC. The case is cited as *King* [the Brooklyn NYC Regional Director] v. *Construction & General Building Laborers' Local 79 et al.,* (E.D.N.Y.).

Unions have engaged in hand-billing job sites using the inflatable rat for years. Expect the U.S. Supreme Court to eventually grant *certiorari*, assuming a divergence occurs within the circuit courts on the use of the inflatable rat. Getting a divergence among the Courts is a question-mark, as Operations eventually told the regions to stop processing cases involving the inflatable rat. In Region 10 and in regions across the nation, the agency failed to win a single case that the rat involved "signal" picketing and not really hand-billing under the NLRA. The Board has obviously had a change of heart, as they approved the 10(j) petition.

The Motor Carrier Exemption under the Fair Labor Standards Act

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

Although there have been some changes in the way that Wage Hour operates since the new administration took over, they have not been drastic. One change is that now the Wage Hour Administrator has begun issuing opinion letters. First, they reissued several letters that were withdrawn in early 2009 by the previous administration and recently issued several new letters, including three this month. One of the recent letters deals with "rounding" of timecards when computing the correct hours worked. All of the opinion letters can be found on the Wage Hour website.

Production Bonuses and Overtime

An opinion letter issued on July 1, 2019 should be of particular interest to employers that pay production bonuses as this letter addresses the method that should be used when computing the overtime that must be paid on a production bonus. The method that an employer uses in determining the bonus affects the method that must be used to compute the correct amount of overtime premium that is due. If the bonus is paid based on **straight time hours only** and covers a period longer than a workweek, the employer does not have to compute the overtime until he can determine the amount of the bonus. For example, if the bonus is paid quarterly, the total bonus must be allocated to each workweek within the quarter and the overtime must then be computed using the hours worked in each individual workweek. The payment of a bonus of $500.00 would require dividing the bonus by 13 weeks to get the weekly equivalent. Once this amount is determined, you must then divide weekly equivalent by the number of hours worked during each workweek. The overtime should be computed by dividing the equivalent amount by the number of hours actually worked during the workweek and overtime is computed at one-half time for the overtime hours worked.

The easier method to properly compute the correct overtime is to base the payment as a **percentage of the employee's gross pay** (both straight time and overtime compensation) during the period covered by the bonus. Then you have correctly computed the overtime premium that is due by multiplying the bonus rate times the gross pay earned during the period.

Each method of computation of the overtime for the quarter will yield you the same gross amount of bonus due, but using the latter method is much easier and more efficient, especially if you are having someone manually compute your payrolls. The letter provides a detailed explanation of the regulations governing such payments.

The Motor Carrier Exemption

Previously, I have discussed the application of Motor Carrier exemption, but I continue to see employers facing litigation regarding the proper application of the exemption. As there have been some changes in the criteria for the overtime exemption, I thought I should provide an updated overview to the requirements. Section 13(b)(1) of the FLSA provides an overtime exemption for employees who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to Section 204 of the Motor Carrier Act of 1935, except those employees covered by the small vehicle exception described below.

Thus, the 13(b)(1) overtime exemption applies to employees who are:

1. Employed by a motor carrier or motor private carrier

2. Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce and

3. Not covered by the small vehicle exception.

The driver, driver's helper, loader, or mechanic's duties must include the performance of safety-affecting activities on a motor vehicle used in transportation on public highways in interstate or foreign commerce. This includes transporting goods that are on an interstate journey even though the employee many not actually cross a state line. Further, safety affecting employees who have not made an actual interstate trip may still meet the duties requirement of the exemption if the employee could, in the regular course of employment, reasonably have been expected to make an interstate journey or could have worked on the motor vehicle in such a way as to be safety-affecting. An employee can also be exempt for a four-month period beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activities.

In 2007, Congress inserted a Small Vehicle Exception to the application of the overtime exemption, which severely limits the exemption, especially for small delivery vehicles such as vans and SUVs. This provision covers employees whose work, in whole or in part, is that of a driver, driver's helper, loader or mechanic affecting the safety of operation of motor vehicles weighing 10,000

pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles**:**

(a) Designed or used to transport more than 8 passengers, including the driver, for compensation; or

(b) Designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; or

(c) Used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation;

Due to the Small Vehicle Exception, the Section 13(b)(1) exemption does not apply to an employee in any workweek the employee performs duties related to the safety of small vehicles, even though the employee's duties may also affect the safety of operation of motor vehicles weighing greater than 10,000 pounds, or other vehicles listed in subsections (a), (b) and (c) above, in the same work week. For example, this means that a mechanic who normally spends his time repairing large vehicles works on vehicle weighing less than 10,000 pounds is not exempt in any week that he works on the small vehicle. When determining whether the vehicle meets the 10,000 pounds requirement, a U.S. District Court in Missouri, confirming Wage Hour's position, ruled that if a vehicle is pulling a trailer, you consider the combined weight of both the vehicle and the trailer to apply the exemption.

The Section 13(b)(1) overtime exemption also does not apply to employees not engaged in "safety affecting activities," such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle. Only drivers, drivers' helpers, loaders who are responsible for proper loading, and mechanics working directly on motor vehicles that are to be used in transportation of passengers or property in interstate commerce can be exempt from the overtime provisions. Further, the overtime exemption does not apply to employees of non-carriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, or firms engaged in the leasing and renting of motor vehicles to carriers.

While the DOT-covered employees are exempt from the overtime regulations, the minimum wage requirements still apply. Most truck drivers earn more than enough per mile that this is not an issue, at least when you consider their active driving time. But what about all that other time away from home? There is a large class action pending in Arkansas based in part on the theory that the DOL's rules that employees on duty for 24 hours can have no more than 8 hours deducted for actual sleep or more (and only then with the employee's agreement) trump DOT rules that restrict truck drivers to 14 hours on duty time during a day and specifically excluded sleeper berth time from on-duty time. A July 22, 2019, opinion letter held that the application of the DOL's 8-hour-per-day maximum sleep exclusion was "unnecessarily burdensome" and that all time where "drivers are relieved of all duties and permitted to sleep in a sleeper berth is presumptively non0working time that is not compensable."

Employers that operate motor vehicles should carefully review how they are paying drivers, drivers' helpers, loaders and mechanics to make sure they are being paid in compliance with the FLSA. Failure to do so can result in a very large liability. If I can be of assistance, please give me a call.

EFFECTIVE SUPERVISOR®

Birmingham, AL – October 3, 2019
8:30am - 4:00pm Central
Vulcan Park and Museum
1701 Valley View Drive, Birmingham, AL 35209

Huntsville, AL – October 17, 2019
8:30am - 4:00pm Central
Redstone Federal Credit Union
220 Wynn Drive, Huntsville, AL 35893

Auburn, AL – October 29, 2019
8:30am - 4:00pm Central

Auburn Center for Developing Industries
1500 Pumphrey Avenue, Suite D
Auburn, AL 36832

Dothan, AL – November 13, 2019
8:30am - 4:00pm Central
Dothan Area Chamber of Commerce
102 Jamestown Blvd, Dothan, AL 36301

Click here for the agenda or to register.

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Jennifer Hix at 205.323.9270 or jhix@lehrmiddlebrooks.com.

In the News

"Go Back to Where You Came From"

According to the EEOC, telling someone to "go back to where you came from" may be potential harassment based upon national origin. "Ethnic slurs and other verbal or physical conduct because of nationality are illegal if they are severe or pervasive and create and intimidating, hostile or offensive work environment, interfere with work performance or negatively affect job opportunities. Examples of potentially unlawful conduct include insults, taunting, or ethnic epithets, such as making fun of a person's foreign accent or comments like, 'Go back to where you came from,' whether made by supervisors or co-workers."

Social Media/Employer Action

Employers have the right and in essence the responsibility to consider the impact on the workplace of what employees say or do away from work. A recent example of this involves Facebook postings by police officers in St. Louis and Philadelphia. Those police departments are investigating Facebook posts by current and former officers that include images of the Confederate flag, a picture of a police dog with its teeth bared and the statement, "I hope you run, he likes fast food," and anti-Islamist comments. Although an employer may not require an employee to provide the employer with access to password-protected social media, what it is either reported to the employer or is in the public domain may be acted upon by the employer. An employer should consider the potential impact of employee social media comments or depictions on the overall workplace culture and employer policies and philosophies regarding equal employment opportunity, no harassment, and diversity and inclusion.

Bumpy ADA Landing for American Airlines

In the case of *Bilinsky v. American Airlines* (7th Cir. June 26, 2019), American Airlines narrowly sustained the District Court's summary judgment in an ADA case regarding working remotely. Bilinsky had been permitted to work remotely due to the severity of her multiple sclerosis. When American merged with U.S. Airways, Bilinsky's position was changed, which required her to be on-site, and relocate from Chicago to the company's Dallas office. Bilinsky did not want to relocate, out of concern that moving to Dallas would exacerbate her multiple sclerosis due to the heat. American terminated her, stated that she was no longer a qualified person with a disability, because she cannot perform the essential job functions. The Court said that prior holdings that working from home would be a required accommodation only in "the extraordinary case" is not so true today, with all of the technology that is available. Thus, although American Airlines won this case quite narrowly, the overriding implication for employers is that as technology has evolved, working from home as a reasonable accommodation is something that may be required more often in the future.

Relying on Federal Arbitration Act, Federal Court Bounces NY Harassment Claim to Arbitration, Despite NY State Law Against Applying Arbitration Agreements to Harassment Claims

In the case of *Latif v. Morgan Stanley & Co., LLC*, the plaintiff Mahmoud Latif claimed his former employers and supervisors and co-workers sexually harassed him and subjected him to harassing and offensive comments about his sexual orientation and religion. At his hire, in June 2017, Latif had executed an offer letter that incorporated by reference his agreement to the Company's arbitration program, which covered all sorts of employment claims. The parties agreed that most of Latif's claims had to be arbitrated. But Latif argued that his sexual harassment claim could not be forced into arbitration due to a 2018 New York, referred to as "Section 7515," that required a party to seek remedy for unlawful sexual harassment in mandatory arbitration, "[e]xcept where inconsistent with federal law." The federal court (properly, in our view) found that New York Section 7515 was very much inconsistent with the Federal Arbitration Act, and ordered the parties to arbitrate the sexual harassment claim.

Calculating Employee Bonuses When Paid Overtime

As discussed in Lyndel's article above, on July 1, 2019, the United States Department of Labor, Wage and Hour Division issued an opinion letter relating to the calculation of bonuses when considering overtime. Non-discretionary bonuses must be calculated to include overtime compensation. According to the DOL regulations and opinion letter, where a bonus is paid based on a percentage of the employees' straight time and overtime earnings, no additional compensation is owed. That pay system includes compensation and calculation for overtime worked. Where a bonus is paid on a quarterly or weekly basis, the employer must include the bonus for a retroactive overtime calculation at the time the employer can ascertain the bonus amount. "Non-discretionary" is where an employee understands that she or he will receive a bonus based upon achieving certain objectives. Periodic "spot" bonuses do not need to be included in overtime calculations. For example, recognizing employees for working an extraordinary number of hours, when employees were unaware that there would be bonus for doing so. To qualify as "discretionary," the employer must retain discretion both as to the fact of payment and as to the amount close to the end of the period for which the bonus is paid. The bonus is determined by the employer without prior promise or agreement. DOL states that "if an employer announces to his employees in January that he intends to pay them a bonus in June, he thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. Such a bonus should not be excluded from the regular rate [when calculating overtime]."

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